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No. 99-1624

Supreme Court, U.S.
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In The
Supreme Court Of The United States

ATC PARTNERSHIP,
Petitioner

v.

TOWN OF WINDHAM, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD P. WEINSTEIN, ESQ.*
NATHAN A. SCHATZ, ESQ.
WEINSTEIN & WISSER, P.C.
29 South Main St., Suite 207
West Hartford, CT 06107
Tel. (860) 561-2628
Fax (860) 521-6150

**Counsel of Record for Petitioner*

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I. REPLY TO BRIEF IN OPPOSITION

The Petitioner, ATC Partnership, files this Reply Brief in Support of its Petition for Certiorari pursuant to Rule 15.6 of the Rules of the Supreme Court. In their opposition brief, the Respondents incorrectly argue that the pending Petition for Certiorari merely involves a question of the proper application of a settled rule of law. To the contrary, this Court has not yet had the opportunity to address a claimed substantive due process violation involving the use of outrageous tactics by local government agencies and their agents, which actions were intended to, and did, interfere with the Petitioner's use and enjoyment of its real and personal property prior to the time that its real property was taken by eminent domain.

Here, the Connecticut Supreme Court evaluated the sufficiency of the allegations of the complaint through a lens that was colored by cases involving substantive due process interference with liberty interests rather than one focused on substantive due process protection of property interests.

While this case may not involve the stomach pumping of *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); or the attempted regulation of personal decisions regarding marriage in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); or regarding contraceptive use in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); those substantive due process *liberty* interest deprivation cases do not provide appropriate guidance when the substantive due process violation at issue in this case involves a deprivation of constitutionally protected *property* interests. As pointed out in the Petition for Certiorari, rather than comparing the facts here to the aforementioned liberty interest cases, it is the approach in a case like *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), that provides the most cogent analysis of the proper standard to be applied when the facts, as here, involve the Fourteenth Amendment's protection of property against the arbitrary, malicious and egregious misuse of governmental power.

The Connecticut Supreme Court in its decision, and the Respondents in their opposition brief, attach little

significance to *Sinaloa*, concluding that it has been "overruled" by the case of *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). That conclusion, however, is an overstatement of the significance of *Armendariz* to the present case. First, *Armendariz* does not overrule *Sinaloa*'s application of the substantive due process standard to a deprivation of constitutionally protected property rights based on government misconduct. Rather, *Armendariz* recognizes that the *different* constitutional limitation on a viable substantive due process claim presented by *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), will preclude reliance on a Fourteenth Amendment substantive due process analysis when a plaintiff's allegations encompass a claim under the Fourteenth (Fifth) Amendment's protection against uncompensated takings or the Fourteenth (Fourth) Amendment's protection against unreasonable search and seizure.

Yet, neither a Fifth Amendment takings claim nor a Fourth Amendment search and seizure claim is applicable to the facts of this case for the reasons stated on pages 22-29 of the Petition for Certiorari. In fact, it is the *Armendariz* court's reliance on *Graham* to "overrule" *Sinaloa* that is very much open

to question in light of this Court's subsequent narrowing of the *Graham* doctrine in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 40 L.Ed.2d 1043 (1998). Under *Lewis*, the type of substantive due process analysis used in *Sinaloa* will be inappropriate only if the Petitioner's claim is "covered by" either the Fourth or the Fifth Amendment. *Id.*, 523 U.S. at 843, 118 S.Ct. at 1715. Here, contrary to the argument of the Respondents and contrary to the analysis of the Connecticut Supreme Court, neither the Takings Clause nore the Fourth Amendment is implicated by the allegations of the Petitioner's Complaint for the reasons already set forth on pages 24-29 of the Petition for Certiorari.

A substantive due process claim is quite different from a just compensation (Takings Clause) claim. To prove a violation of the Takings Clause, a plaintiff must demonstrate a taking of property and a lack of just compensation. To prove a substantive (or arbitrary and capricious) due process claim, by contrast, "a plaintiff need only prove that the government has acted arbitrarily and capriciously." *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990). Thus, a taking of property may give rise to a

substantive due process claim *based on its manner and motive*, but *not* give rise to a just compensation (takings) claim because the landowner has been paid the value of its property: "if a governmental entity has acted arbitrarily and capriciously . . . in the course of eminent domain proceedings, the fact that just compensation is paid would not undo the arbitrary act, nor cure the constitutional violation." *Id.*, 722 n. 10. For this reason, the Connecticut Supreme Court's reliance on the Takings Clause as an "explicit textual source of constitutional protection" to deprive the petitioner of its substantive due process claim was incorrect.

The Connecticut Supreme Court's reliance on the Fourth Amendment (search and seizure) as another "explicit textual source of constitutional protection" to deprive the petitioner of its substantive due process claim under *Graham v. Connor* was also incorrect, albeit for a different reason. In *County of Sacramento v. Lewis*, this Court recognized that *Graham v. Connor* requires resort to Fourth Amendment analysis "only if the [plaintiff's] claim is 'covered by' the Fourth Amendment." *County of Sacramento v. Lewis*, 523 U.S. at

843, 118 S.Ct. at 1715. "The Fourth Amendment covers only 'searches and seizures,' . . . neither of which took place here." *Id.* (citation omitted). The unlawful interference with the petitioner's property rights here, through the artificial creation of tax liability and through the use of police presence to intimidate the petitioner in the course of a carefully orchestrated scheme to interfere with the petitioner's possessory and development rights in its property, is not conduct which implicates the proscription on unreasonable searches and seizures normally associated with the Fourth Amendment and its concern for the proper conduct of law enforcement activities. Thus, as this Court concluded in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), where the "purpose and effect" of governmental conduct affecting property rights "go[es] beyond the traditional meaning of search and seizure . . . [such as where] the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself . . . [o]ur cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth

Amendments." *Id.*, 510 U.S. at 52, 114 S.Ct. at 502.[1]

By relying on the Fourth Amendment to preclude substantive due process analysis of the facts of this case, the Connecticut Supreme Court misapplied *Graham* and failed to follow the most recent application of the *Graham* doctrine by this Court in *County of Sacramento*. Therefore, contrary to the conclusion of the Connecticut Supreme Court, the

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[1] Both the Connecticut Supreme Court in its decision and the Respondents in their opposition brief suggest that the Petitioner's reliance on the *James Daniel Good Real Property* case is misplaced because that case involved a claim of procedural, and not substantive, due process. While it is true that the *James Daniel Good Real Property* case does involve a procedural, and not a substantive, due process claim, that does not diminish its significance to the issue presented here because, in *James Daniel Good Real Property*, this Court specifically addressed the proper scope and reach of the Fourth Amendment, finding the Fourth Amendment to be inapplicable in a case, like the present one, that involved governmental interference with property rights for the purpose of asserting ownership and control over property, rather than for the purpose of preserving evidence of wrongdoing . *United States v. James Daniel Good Real Property*, 510 U.S. at 52, 114 S.Ct. at 502. Had the Connecticut Supreme Court properly considered that conclusion from the *James Daniel Good Real Property* case, it would have come to a different conclusion regarding whether the Petitioner's substantive due process claim here was "covered by" the Fourth Amendment.

governmental misconduct alleged in the Complaint here is most appropriately analyzed under the rubric of substantive due process, and such analysis should not be precluded by the reach of any other provision of our federal constitution.

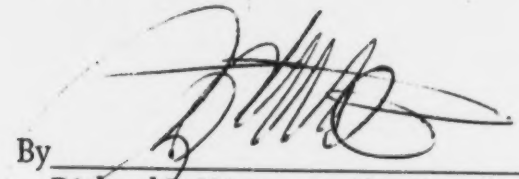
The Petitioner has suffered an egregious interference with its constitutionally protected property rights as a result of the Respondents' willful misuse of their governmental authority. The Petitioner should be permitted to pursue the allegations of its Complaint in order to vindicate its important property rights under the rubric of substantive due process.

II. CONCLUSION

Accordingly, for all of the reasons set forth in the Petition for Certiorari and for the additional reasons set forth in this Reply Brief, the Petition For A Writ Of Certiorari to the Supreme Court of the State of Connecticut should be granted.

RESPECTFULLY SUBMITTED,

PETITIONER,
ATC PARTNERSHIP



By_____
Richard P. Weinstein, Esquire of
WEINSTEIN & WISSER, P.C.
29 South Main Street, Suite 207
West Hartford, CT 06107
Telephone No. (860) 561-2628
Facsimile No. (860) 521-6150
Connecticut Juris No. 45674